1987

OK Motors, Inc. dba Mountain Motors v. Charles P. Hill : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

OK MOTORS, INC., d/b/a MOUNTAIN MOTORS, Plaintiff--Appellant vs. CHARLES P. HILL, Defendant--Respondent	)	Civil No. 870216-CA Category No. 14b

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BRIEF OF RESPONDENT

Appeal from Judgment, May 4, 1987
Eighth Circuit Court, Utah County
Honorable E. Patrick McGuire, Circuit Judge

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Annotated, Section 78-2a-3(c), as amended in 1986.

STATEMENT OF THE NATURE OF PROCEEDINGS BELOW

This case is an appeal from an Order of the Eighth Circuit Court for Utah County which granted the defendant's Motion for Summary Judgment.

STATEMENT OF ISSUES PRESENTED FOR APPEAL

1. Whether the plaintiff, on appeal, may assert additional facts which it failed to timely submit to the Circuit Court prior to the hearing of the defendant's Motion for Summary Judgment?

2. Whether, by virtue of the non-conformity of the automobile to the contract, Mr. Hill made a timely and effective rejection of its delivery, or a revocation of its acceptance?

3. Whether, by virtue of defects rendering the automobile inoperable, the contract is voidable under the doctrine of failure of consideration?

4. Whether, because of the oppressive and one-sided nature of the agreement, the disclaimers of warranties set forth in the contract are unconscionable?

DETERMINATIVE STATUTORY PROVISIONS

The defendant believes that the following statutes, rules and regulations are fundamental or important for a determination of the issues presented for review herein: Utah Code Annotated, 1953, as amended, Sections 70A-2-302, 70A-2-313, 70A-2-314 70A-2-601, 70A-2-602, 70A-2-606, 70A-2-607, 70A-2-608, 15 U.S.C. Section 2308(b), and 16 C.F.R. § 455. Each of these provisions is set forth in the Addendum.

STATEMENT OF THE CASE

A. Nature and Course of the Proceedings Below

This case is an appeal from an order granting the defendant's motion for summary judgment based upon remedies under the Utah Uniform Commercial Code and under the common law theories of unconscionability and failure of consideration.

On January 31, 1986, the plaintiff filed its Complaint alleging that the defendant, Charles P. Hill, breached an agreement to purchase a 1981 Volkswagen by virtue of Mr. Hill's cancellation of the contract and stopping payment on the check paid for an automobile. (Record at 1). Within the time required by law, the defendant answered the plaintiff's Complaint and filed its Counterclaim. The defendant admitted that he had stopped payment on the check, and affirmatively alleged that he had cancelled his contract with the plaintiff for the reason that shortly after the delivery of the automobile to him, it became totally inoperable. (Record at 5). Subsequent to the filing of the defendant's Answer and Counterclaim, the parties performed discovery in the nature of Interrogatories, Requests for Production of Documents and Requests for Admissions. (Record at 21, 53, 75). On or about February 24, 1987, Mr. Hill filed his Motion for Summary Judgment against the plaintiff, (Record at 95) and on March 31, 1987, the Court entered a minute entry granting the defendant's Motion for Summary Judgment. (Record at 128). A

final Order Granting Defendant's Motion for Summary Judgment was signed by the Court on May 4, 1987. (Record at 129).

B. Procedural Background of Motion for Summary Judgment

With respect to the Motion for Summary Judgment filed by Mr. Hill on February 24, 1987, it is important to note the procedural status of the case at that time. As stated, Mr. Hill's Motion for Summary Judgment was filed on February 24, 1987. (Record at 95). Three days thereafter, Ralph C. Amott withdrew as counsel for the plaintiff. (Record at 114). Michael J. Petro, the present counsel for the plaintiff, gave notice of his appearance as counsel for the plaintiff at the hearing on the Motion for Summary Judgment held on March 11, 1987. (Record at 121). At that time, the plaintiff failed to present any counter-affidavits or other sworn submissions to controvert either the Affidavit of Diane S. Hill or the Defendant's Answers to the Plaintiff's Interrogatories filed earlier in the case. Therefore, at the time of the hearing, the plaintiff proceeded relying only upon its Memorandum of Points and Authorities, the arguments raised at the hearing, and its answers to the Defendant's First Set of Interrogatories. (Record at 21).

C. Factual Background of Case

The appellant's statement of the case contains numerous statements which are not factual, are erroneous or improper.

Because several of these statements are asserted or relied upon by the appellant throughout the body of its brief, the defendant makes the following statement which it believes accurately reflects the record.

1. The Undisputed Facts on Appeal

Charles P. Hill, who was a resident of Delta, Utah at the time in question (Record at 4), appeared at the plaintiff's place of business on or about December 17, 1985, and on that date was shown and test drove a 1981 Volkswagen Rabbit. (Record at 76). The test drive of the automobile constituted "driving the car around two or three blocks at speeds less than 30 m.p.h." (Id.) Thereafter, Mr. Hill returned to his home in Delta, Utah.

Two days later, on December 19, 1985, Mr. Hill returned to the plaintiff's place of business and tendered to plaintiff a check in the amount of $2,642.88, and possession of the car was delivered to him. (Record at 77). Subsequent to this, Mr. Hill drove the car toward Salt Lake City. After driving "approximately 50 miles from the plaintiff's place of business, the car simply quit moving and would not go forward or backward." (Record at 79).

Because of the breakdown, Mr. Hill left the car on the shoulder of the highway (Record at 79) and called his wife. (Record at 116 - 117). Upon speaking with her husband, Mrs. Hill

telephoned the plaintiff's place of business and spoke with an employee who identified herself as "Stacy." (Record at 117). Stacy told Mrs. Hill that the plaintiff would tow the automobile back to its lot and that one of her bosses would contact the Hills regarding the breakdown. (Record at 117). After making numerous follow-up telephone calls to the plaintiff, the Hills stopped payment on the check, and only then received a response from the plaintiff's president who refused to make any repairs to the vehicle and demanded immediate payment. (Record at 117 - 120). As a result, the Hills returned the keys to the plaintiff. (Record at 117).

The facts set forth above are all contained in the Record as part of the defendant's answers to the plaintiff's Interrogatories or in the Affidavit of Diane S. Hill. These facts are all admissible, and under the standards of Rule 56 of the Utah Rules of Civil Procedure, formed the foundation upon which the Circuit Court based its decision.

2. The "Facts" Which are Illusory or Otherwise Improperly Asserted by the Plaintiff

Several of the "facts" set forth in the plaintiff's statement of the case and throughout the plaintiff's brief are illusory, are not supported by sworn statements, are not admissible, or are otherwise improper under Rule 56. Because these "facts" are critical to the disposition of this appeal, issue is taken with each of these below.

In the first paragraph of the plaintiff's Statement of the Case, (Plaintiff at 2), and throughout its brief (e.g., Plaintiff at 6), the plaintiff alleges that Mr. Hill purchased the vehicle on as "As Is" basis and "signed his agreement to such a statement (attached as Exhibit B) and accepted delivery of the automobile." (Record at 16). In Mr. Hill's answers to the plaintiff's Requests for Admissions No. 2, Mr. Hill admitted only that the signature on the alleged Buyer's Guide appeared to be his, and denied the remaining allegations of the Request for the reason that he was not certain that the Buyer's Guide was complete at the time of the sale. (Record at 84). Based upon the record, the most that could be said is that an incomplete Buyer's Guide contained what appeared to be the defendant's signature.

In the second paragraph of its Statement of the Case (Plaintiff at 2-3), the plaintiff alleges that upon speaking with Mrs. Hill regarding the breakdown, the plaintiff's secretary, Stacy Dixon, advised Mrs. Hill that there were "three examples" of what might be done to the vehicle. The record, however, contains no affidavit or sworn statement to support what she allegedly said. A review of the Plaintiff's Answers to the Defendant's Interrogatories contained in the Record at Pages 21 through 32, shows only that Mr. Jim Skelton, the office manager of the plaintiff, prepared and verified the Plaintiff's Answers to the Defendant's Interrogatories. Therefore, Mr. Hill objects

to the statements allegedly attributable to Stacy Dixon since they are hearsay, and as such are inadmissible and form an inappropriate basis to support the plaintiff's objection to a Motion for Summary Judgment.

In the third paragraph of the Statement of the Case, (Plaintiff at 3), the plaintiff alleges that in a telephone conversation between the plaintiff's president, Sarkas Barakat and Mrs. Hill, Mrs. Hill was reminded that the automobile was sold "As Is" and that Mr. Hill had been informed that she was responsible for any defects in the vehicle. With respect to this allegation, the Record is completey devoid of any sworn statement of Mr. Barakat relative to his conversation with Mrs. Hill or with any other individual, and any such statement, if made, was hearsay, and is inadmissible. Therefore, this allegation is improperly presented as part of the plaintiff's brief.

In the plaintiff's Summary of the Argument (Plaintiff at 2-5) and throughout the text of the plaintiff's argument, the plaintiff continually alleges that Mr. Hill had "the opportunity to inspect and test drive the vehicle over a two day period." (Record at 4, 9, 12 - 13, 16 and 17). This allegation is untrue and should not be considered for the reason that Mr. Hill resides in Delta, Utah. There is no evidence whatsoever before the Court that Mr. Hill was able to perform a further examination of the vehicle during the two-day period between the time when he test drove the car and returned to Orem to take delivery.

SUMMARY OF ARGUMENTS

Under clear standards of Utah law, in an appeal from an Order granting a Motion for Summary Judgment, the party moved against may not set forth additional facts or allegations which not presented by Affidavit or otherwise proper under Rule 56 of the Utah Rules of Civil Procedure. Therefore, the plaintiff's reliance upon facts which are inadmissible or otherwise improper under Rule 56, and which are not supported in the Record, are not properly before the Court, and provide no support for the plaintiff's arguments.

By virtue of the vehicle's failure to conform to the contract, Mr. Hill made a timely and effective rejection of the delivery of the vehicle, and if the Court finds that he had accepted the vehicle, he made a timely and effective revocation of his acceptance based upon the non-conformity which substantially impaired the value of the automobile to Mr. Hill.

The December 19, 1985, contract whereunder Mr. Hill agreed to buy a 1981 VW Rabbit Diesel from the plaintiff was voidable under the doctrine of failure of consideration for the reason that Mr. Hill gave full performance of his obligation under the contract, and the plaintiff failed to tender his performance by its delivery of an inoperative automobile.

The plaintiff's exclusions of the implied warranty of merchantability were unenforceable against Mr. Hill for the

reason that they were so grossly oppressive and one sided as to render the disclaimers unconscionable. As a result of the unenforceability of these provisions, the parties' agreement was clothed with the implied warranty of merchantability under the Uniform Commercial Code, and due to the latent defect in the automobile, this warranty was breached. Mr. Hill was, therefore, entitled to cancel the contract.

ARGUMENT

In its Brief on Appeal, the plaintiff has assailed each of the theories under which the Circuit Court granted Mr. Hill's Motion for Summary Judgment. Sucinctly, the Circuit Court found in favor of Mr. Hill for the following reasons: Mr. Hill rejected the plaintiff's tender of the automobile after discovering its non-conformity, or if Mr. Hill "accepted" the automobile, he duly revoked his acceptance (U.C.A. §§ 70A-2-601, 70A-2-608); the contract was duly avoided by Mr. Hill for failure of consideration; and, finally, the disclaimer of warranties was unconscionable (U.C.A. § 70A-2-302). As a result, Mr. Hill was entitled to cancel the contract based upon the plaintiff's breach of the implied warranty of merchantability. (U.S.A. § 70A-2-314).

POINT I

THE FACTS BEFORE THE COURT ARE LIMITED TO THOSE WHICH WERE PROPERLY SUBMITTED TO THE CIRCUIT COURT.

As pointed out in the Statement of the Case, the plaintiff failed to file any sworn submissions to dispute the allegations of the Affidavit of Diane S. Hill, and the only sworn submissions of the plaintiff consisted of its answers to the Defendant's First Set of Interrogatories. (Record at 21-32). Under the law of the State of Utah, while the Court is to view the facts in a summary judgment in a light most favorable to the party moved against, Webster v. Sill, 675 P.2d 1170 (Utah 1983), if the opposing party fails to file affidavits controverting those of the movant, the facts set forth in the movant's affidavits and other sworn submissions are deemed admitted. Under this circumstance, the party moved against is bound by the movant's affidavits and has waived the right to raise other "facts" on appeal in a belated effort to create genuine issues of material fact. Strange v. Ostlund, 594 P.2d 877 (Utah 1979), Franklin Financial v. New Empire Development Company, 659 P.2d 1040 (Utah 1983). In addition, any submissions in opposition to a motion for summary judgment must set forth facts that would be admissible into evidence. Norton v. Blackham, 669 P.2d 857 (Utah 1983). Therefore, by the plaintiff's failure to submit affidavits at the time of the hearing, it waived its right to controvert the Affidavit of Mrs. Hill and the other sworn statements of the defendant, and the hearsay statements attributable to Sarkas

Barakat, Jeff Lush and Stacy Dixon, if they were material, are not properly before this Court and may not be relied upon by the plaintiff to support its position.

POINT II

THE DEFENDANT MADE A TIMELY AND EFFECTIVE REJECTION OF THE AUTOMOBILE.

Under the Utah Uniform Commercial Code, if goods or a tender of delivery fail in any respect to conform to the contract, and if the buyer does not accept the goods, he may reject them. (U.C.A. § 70A-2-601, 70A-2-607, 1953, as amended)

A. The Automobile Failed to Conform to the Contract

Section 2-106(2) of the Uniform Commercial Code states that:

> "Goods or conduct, including any part of a performance, are 'conforming' or conform to the contract when they are in accordance with the obligations under the contract."

In this case, the plaintiff agreed to sell Mr. Hill a used 1981 Volkswagen Rabbit. Based upon Mr. Hill's examination of the vehicle, his test drive, and the seller's representation that is was a "good car" and much better than the other vehicle Mr. Hill had looked at (Record at 76), the agreement for purchase implied that the automobile would function for a reasonable period of time as it did at the time of the test drive and inspection. In

fact, the automobile was not operative and failed to conform, in that respect, to the contract.

In its Brief on Appeal, the plaintiff asserts that, in essence, the alleged "As Is" clause of the contract eliminated any responsibility of the seller as to the condition of the automobile. The commentary to Section 2-313 (Express Warranties) of the Uniform Commercial Code discusses the foundation of the law of warranties stating that its "whole purpose . . . is to determine what it is that the seller has agreed to sell . . . ." The commentary goes on to state that "a contract is normally a contract for a sale of something describable and described . . ." and that

> "[a] clause generally disclaiming 'all warranties express or implied' cannot reduce a seller's obligation with respect to such description and, therefore, cannot be given literal effect under 2-316." (Exclusion and modification of warranties)

In support of this position, the plaintiff cites cases from the states of Oregon and Kansas which it claims stand for the proposition that when goods are sold "As Is" they conform to the contract regardless to how illusory or oppressive the result. (Plaintiff's Brief at 6). The plaintiff's reliance upon these cases is improper. In Clark v. Ford Motor Company, 46 Or. App. 521, 612 P.2d 316 (1984), the Court was faced with a factual pattern clearly distinguishable from that of the present case. In Clark, the purchaser had purchased a new vehicle from a dealer.

The manufacturer had given the purchaser an express warranty, and the seller disclaimed all warranties, express or implied. A reading of the case indicates that the Oregon Court made its decision on a factual pattern vastly different from the present case, and did not rule "that a used car sold 'as is' cannot be found to be conforming 'by definition' because the buyer received exactly what he bargained for" as claimed in the plaintiff's Brief. (Plaintiff's Brief at 6). Moreover, the Court specifically noted that there was no issue raised by the plaintiff as to the effectiveness of the disclaimer and declined to make any judgment as to its effectiveness. 612 P.2d at 319, Note 5.

The plaintiff also relies upon the case of International Petroleum Services, Inc. v. S and N Well Service, Inc., 230 Kan. 452, 639 P.2d 29 (1982). In that case, the specific issue before the Court was whether the implied warranties of the Uniform Commercial Code applied to the sale of used goods. The Court held that these warranties may arise in the context of the sale of used goods, but stated that there may be situations where the warranties do not arise, including when the warranties are disclaimed and the goods offered for sale "as is" or "with all faults." 639 P.2d at 34. However, the Court specifically noted that the requirements of the disclaimer statute must be met and that the limitation must also meet the standards of the Kansas Consumer Protection Act KSA Section 50-639(c)(d), which allows a seller to disclaim such warranties only if he is able to establish that the buyer had knowledge of the defects.

In all fairness, the Clark and International Petroleum cases are inapposite when viewed in light of the facts of this case. Their facts are clearly distinguishable as are the rights and remedies of the buyers in those cases. As a result, these cases fail to compel the conclusion sought by the plaintiff and provide no support for its appeal.

The better approach to the problem of non-conformity and disclaimers of warranties was taken in the case of Blankenship v. Northtown Ford, Inc., 95 Ill. App. 3d 303, 420 N.E.2d 167 (1981), where the Court held that a dealer would not be allowed to avoid a buyer's cancellation of a contract by virtue of its technical compliance with Section 2-316 of the Uniform Commercial Code. The Court rejected what it called the "logical extension" of the dealer's argument which was, in essence, that by disclaiming warranties, a purchaser's cancellation would be barred in the event that the seller sold a car that turned out not to have an engine. 420 N.E.2d at 171.

Because of the substantial defect which caused the automobile to break down and become inoperative, the vehicle failed to conform to the contract and Mr. Hill was entitled to his right to reject the delivery, or if he had already given his "acceptance" of the vehicle, to revoke his acceptance. U.C.A. §§ 2-601, 2-608.

B. The Defendant Never Accepted Delivery of the Rabbit

The mere act of taking possession does not constitute an "acceptance" under the provisions of the Utah Commercial Code because, under the Code, a buyer is not deemed to have accepted goods until he has had a reasonable opportunity to inspect them. U.C.A. § 70A-2-606(1)(a).

The case of Shelton v. Farkas, 30 Wash. App. 549, 635 P.2d 1109 (1981) presents a factual pattern which is nearly identical to that of this case. In Shelton, the defendant went to the plaintiff's place of business for the purpose of purchasing a violin. The seller represented that the violin was of good quality, and that the price was discounted because the buyer was "willing to take it on an 'as is' basis." 635 P.2d at 1111. Two days after the purchase, the defendant presented the violin to her instructor, who immediately informed her that it had a poor tone, that it had a crack in the body and was not the right instrument for her. When the seller refused to refund the defendant's money, she stopped payment on the check. At the trial of the action, the Court found in favor of the defendant, and the seller appealed.

On appeal, the Washington Court of Appeals affirmed the trial court and rejected the seller's contention that the "as is" clause of the contract precluded the buyer's right to reasonably inspect the goods prior to acceptance or to revoke after accep-

tance, noting that the use of an "as is" expression is relevant only to exclusion or modification of warranties. Citing the White and Summers Treatise on the Uniform Commercial Code, the Court went on to note that the passing of title is unrelated to whether a buyer has accepted goods (See Commentary to Uniform Commercial Code § 2-606, Comment No. 2), and that "in the usual case, the buyer will have had possession of the goods for some time before he has 'accepted them'". Finally, following the requirements of § 2-606 of the Uniform Commercial Code, the Court held that "acceptance" of goods occurs only after the buyer has had a reasonable opportunity to inspect them and signifies to the seller that they are conforming or that he will retain them in spite of their non-conformity. 635 P.2d at 1113. Based on this analysis, the Court ruled that under the facts of the case, a two-day period to accept was within a reasonable time to do so.

In Zabrieski Chevrolet, Inc. v. Smith, 99 N.J. Super. 441, 5 UCCRS 30, 240 A.2d 195 (1968), a case dealing with a defective automobile, the Court recognized that the purchaser does not accept goods until he has had "a reasonable opportunity to inspect them." The Court went on to hold that the proverbial "spin around the block does not provide a reasonable opportunity to inspect, and further stated that the seller's contentions in this regard were illusory and unrealistic." 5 UCCRS at 38.

In the case at bar, Mr. Hill performed the ritualistic spin around the block and then two days later took possession of

the Rabbit. After traveling approximately 50 miles, the car had broken down and was completely inoperative. Under the standards identified above, when the car broke down within two hours after its delivery, Mr. Hill was still within the ambit of "the reasonable opportunity to inspect." Therefore, acceptance cannot be deemed to have occurred, and Mr. Hill was entitled to reject the tender of the vehicle.

Throughout its Brief, the plaintiff refers to an alleged two-day period within which Mr. Hill could have inspected the vehicle. The plaintiff's allegation in this regard is illusory and distorted for the reason that, as stated in the Statement of the Case, at the time of the purchase, Mr. Hill was a resident of Delta, Utah, and after his initial test drive of the vehicle, he returned to his home in Delta. Therefore, any allegations of the plaintiff relative to Mr. Hill's "two-day opportunity to inspect" are misleading, not supported by the Record, and form an insufficient basis for the plaintiff's contentions.

C. The Defendant Seasonably Notified the Plaintiff of the Rejection and Effectively Cancelled the Contract

Under Section 2-601 of the Uniform Commercial Code, a buyer can reject a delivery of goods "if the goods fail in any respect to conform to the contract." As shown above, the automobile failed to conform to the contract and at the time of the breakdown Mr. Hill had not yet had a reasonable opportunity to inspect the vehicle.

Section 70A-2-602 of the Utah Uniform Commercial Code states that "rejection of goods must be within a reasonable time after their delivery or tender" and that rejection "is ineffective unless the buyer seasonably notifies the seller." Although what constitutes a reasonable time for rejection is considered a question of fact to be determined from the circumstances of the case, Christopher v. Larsen Ford Sales, Inc., 557 P.2d 1009, 1012 (Utah 1976), it is undisputed that the Hills notified the plaintiff of the defect almost immediately after the car broke down. (Record at 117). It is further undisputed that the Hills attempted several other communications with the plaintiff, that for several days the plaintiff refused to return the Hills' calls, and that after the Hills had stopped payment on the check, the plaintiff refused to repair the car. (Record at 117). It is also undisputed that after the plaintiff refused to repair the car, the Hills returned the keys to the plaintiff. (Record at 117). Under these facts, it is clear that the Hills simply could not have given notice of their rejection any sooner than when made. Therefore, based upon these undisputed facts, the Hills effectively rejected the delivery of the Rabbit and cancelled the contract. U.C.A. §§ 70A-2-602, 70A-2-711.

POINT III

IF DELIVERY WAS ACCEPTED, MR. HILL EFFECTIVELY REVOKED HIS ACCEPTANCE OF THE RABBIT.

Even if Mr. Hill "accepted" the automobile, he "revoked" his acceptance. See U.C.A. § 70A-2-608. Under Section

70A-2-608(1)(b) of the Utah Uniform Commercial Code, a buyer may revoke his acceptance of goods whose non-conformity substantially impairs its value to him if he has accepted the goods without discovery of the non-conformity and his acceptance was reasonably induced by the difficulty of discovery before acceptance. See Ford Motor Credit Company v. Harper, 671 F.2d 1117 (8th Cir. 1982).

A. The Rabbit's Non-conformity Substantially Impaired its Value to Mr. Hill

The non-conformity of the vehicle is established by Hill's uncontroverted affidavit. Therefore, the initial inquiry on the issue of revocation of acceptance is whether the non-conformity substantially impaired the value of the vehicle to Mr. Hill. In analyzing the issue of impairment of value, the Court looks to the effect of the impairment on the particular buyer, and most Courts have agreed that while the test is subjective, the issue is best resolved by looking at the objective evidence available to the Court rather than on the personal belief of the buyer. Aubrey's RV Center v. Tandy Corp., 46 Wash. App. 595, 731 P.2d 1124, 1128 (1987) and Fargo Machine and Tool Company v. Carney and Trecker, 428 F. Supp. 364, 379 (East. Dist. Mich. 1977). It has also been stated that "the test for substantial impairment is . . . at bottom a common sense perception." Ford Motor Credit Company v. Harper, 671 F.2d at 1124. Common sense compels the conclusion that the 1981 Rabbit was purchased for the

purpose of providing transportation to Mr. Hill, and that when it broke down and would not move forward or backward, and the plaintiff refused responsibility for any repairs, any anticipated value the vehicle may have had to Mr. Hill was completely destroyed.

The plaintiff raises arguments that the value of the vehicle is not substantially impaired to Mr. Hill. (Plaintiff's Brief at 11-12). First, the plaintiff argues that Mr. Hill should have expected to make repairs to the vehicle regardless of when they became necessary. Second, the plaintiff assumes that the vehicle could have been repaired, and argues that Mr. Hill had an obligation to show that the car could not have been repaired.

These arguments simply beg the question of whether, in light of the facts before the court, a finding of substantial impairment of value was supportable. The undisputed and only facts before the Court show that the automobile broke down and would not move forward and backward (Record at 79), that Mr. Hill's wife contacted the plaintiff and was assured that the plaintiff would tow the car back to its lot (Record at 117), that the car was never recovered by the plaintiff (Record at 80), and that the plaintiff refused to make any repairs or inspection. These facts compel the conclusion that the value of the vehicle to the defendant was substantially impaired. Presumably, the car

was sold for storage fees and the nature and extent of the breakdown will never be determined. Under the facts set forth above, the Hills were entitled to rely upon the plaintiff's representations that it would tow the car back to its lot, and inasmuch as the plaintiff failed to do so, any common sense perception of Mr. Hill's description of the breakdown compels the conclusion that the value of the vehicle to Mr. Hill was destroyed.

B. The Defect was Latent

It is undisputed that Mr. Hill accepted the Rabbit without knowledge of the non-conformity, and it is axomatic his acceptance was induced by the difficulty of its discovery. The latent nature of the car's defect prevented its discovery until Mr. Hill had driven the car approximately 50 miles. Certainly, any reasonable person would not have purchased such a vehicle having knowledge of that defect.

C. The Defendant Gave Timely Notice of Revocation

Timeliness of a notice of revocation of acceptance, as with notice of rejection, should be determined from the circumstances of the case. Christopher v. Larsen Ford Sales, Inc., supra. The official comment to Section 2-608 of the Uniform Commercial Code states that notice of revocation of acceptance should be made "within a reasonable time after discovery of the grounds for such revocation." The commentary goes on to state

that "this reasonable time period should extend in most cases beyond the time in which notification of breach must be given, beyond the time of discovery of non-conformity after acceptance, and beyond the time for rejection after tender." Official commentary to Uniform Commercial Code Section 2-608, No. 4.

As stated above, the defendant gave notice of revocation immediately after the defect was discovered. Subsequently, there were several telephone calls placed to the plaintiff's place of business, a telephone call between Mrs. Hill and Mr. Barakat, and finally a letter from Mrs. Hill to the plaintiff in which the keys to the Rabbit were returned to the plaintiff. (Record at 119-120). Under the circumstances, all of which are supported by the Affidavit of Diane S. Hill and uncontroverted as well as by the defendant's answers to the plaintiff's Interrogatories, the revocation was timely within the meaning of Section 70A-2-608. Therefore, based upon the timely notice of a non-conformity with the contract which substantially impaired the value of the vehicle to Mr. Hill, Mr. Hill effectively cancelled the contract and the decision of the Circuit Court should be affirmed.

POINT IV

THE CONTRACT IS VOIDABLE FOR FAILURE OF CONSIDERATION.

The consideration for the December 19, 1985, contract was the delivery of a 1981 VW Rabbit Diesel which would provide adequate transportation for a reasonable time. Because of the

defect in the automobile, the contract is subject to rescission based on the doctrine of failure of consideration.

In reference to the defense of failure of consideration, the Utah Supreme Court has stated that the defense "exists wherever one who has either given or has promised to give some performance fails, without his fault, to receive in some material respect the agreed exchange for that performance." Bentley v. Potter, 694 P.2d 617 (Utah 1984), citing Williston, Law of Contracts, Section 814 at 17-78 (3rd ed. 1962). The facts in this case clearly fit this definition. By tendering his check to the plaintiff, Mr. Hill gave his performance, and due to no fault of his own, received an automobile that proved totally defective and inoperable. Simply put, Mr. Hill did not receive what he bargained for.

The plaintiff argues that by virtue of the alleged "as is" sale, the contract for sale was supported by adequate consideration. In support of this position, the plaintiff cites the case of Yanish v. Fernandez, 156 Colo. 255, 397 P.2d 881 (1965). The plaintiff claims that the Yanish case stands for the proposition, in effect, that any "as is" contract for the sale of goods, no matter how illusory or one-sided, is supported by adequate consideration. Yanish makes no such claim, but rather is based upon warranty theories and makes no ruling whatsoever that "as is" contracts are, as a matter of law, supported by con-

sideration. The undisputed facts before the Court compel one conclusion: Mr. Hill did not receive what he bargained for and was promised, that the contract failed for lack of consideration, and that the judgment of the Circuit Court should be affirmed.

POINT V

THE PLAINTIFF'S EXCLUSIONS OF IMPLIED WARRANTIES ARE INEFFECTIVE FOR THE REASON THAT THEY ARE UNCONSCIONABLE.

Under the Uniform Commercial Code express and implied warranties may be excluded by meeting certain requirements. See U.C.A. § 70A-2-316. However, as with all contract provisions, disclaimers of warranties are unenforceable if they are unconscionable. See § 70A-2-302. See also 15 U.S.C. § 2308(b).

A. Plaintiff's Exclusions of Warranty are Unconscionable and Hence, Unenforceable

In cases with facts almost identical to the case at bar, Courts of other jurisdictions have found exclusionary language such as that in this case unconscionable. For example, in Industralease v. RME Enterprises, 396 N.Y.S.2d 427 (N.Y. App. Div. 1977) the respondent leased equipment from the appellant which, once installed, never worked. The lease contained language disclaiming all express and implied warranties. The issue before the Court was whether the disclaimers were unconscionable under circumstances where the equipment never operated. The Court stated that "although the statute prescribes

that we are to determine unconscionability as of the time of the making of the contract, we cannot divorce entirely the events which occurred later." 396 N.Y.S. at 432. After finding that the equipment did not work at all and did not achieve any of the purposes intended by the parties, the Court held that the result was "so one-sided . . . that the disclaimer in good conscience should not be enforced . . ." and that "the disclaimer of warranties is unconscionable under the circumstances and should not be enforced." Id. Other cases reaching the same conclusion on similar facts are Safarti v. M A Hittner & Sons, Inc., 318 N.Y.S.2d 352 (N.Y. App. Div. 1970); Eckstein v. Cummins, 321 N.E.2d 897 (Ohio App. 1974); and LaVere v. R.M. Burritt Motors, Inc., 446 N.Y.S.2d 851 (City Ct. N.Y. 1982).

In the case of Resource Management Corporation v. Western Ranch & Livestock Company, Inc., 706 P.2d 1028 (Utah 1985), the Utah Supreme Court discussed the doctrine of unconscionability. The Court identified at least three standards by which unconscionability is tested:

> 1. Whether in light of the general commercial background and the general commercial needs of the particular trade or case, the clauses are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract . . . . The principal is one of the prevention of oppression and unfair surprise. Official comment to U.S.C. § 2-302.

2. Whether the clause or contract is one that 'no decent fair-minded person would view without being possessed of a profound sense of injustice.' Carlson v. Hamilton, 275 P.2d 989, 8 Utah 2d 272 (1958).

3. Whether the contract shows an overall imbalance in the obligations and rights imposed by the bargain. Bekins Bar-V Ranch v. Huth, 664 P.2d 455 (Utah 1983).

The Court also recognized the rule that while unconscionability is generally determined at the time the contract is made, a Court may refuse to enforce a contract where subsequent events turn out to be such as were not within the reasonable contemplation of the parties at the time the contract was entered. 706 P.2d at 1045-46, citing Link v. Wirtz, 638 P.2d 985, 986 (Kan. 1982).

This case presents a factual pattern that falls clearly within the parameters of each of the tests recognized by the Utah Supreme Court. Mr. Hill was most certainly surprised, and unfairly so, when he discovered that the automobile he had purchased from a reputable dealer, and had paid for minutes earlier was inoperable. Certainly no fair-minded person could view enforcement of the contract as anything less than a sanction of a transaction, which from its inception was entirely out of balance and imposed upon Mr. Hill a total forfeiture of the bargain he anticipated. Finally, the oppressive result of the disclaimer serves only to promote unfair surprise, making the

contract wholly one-sided, with the plaintiff receiving over $2,500.00, and Mr. Hill receiving an inoperable and worthless vehicle.

While giving lip service to the policy of preventing opression and unfair surprise, the plaintiff makes much ado about the policy of not disturbing the allocation of risks allegedly contemplated by the contract, and again argues that Mr. Hill "had two days to bargain for, inspect and accept the automobile and should not have been surprised by the "as is" contract." (Plaintiff at 14-18). As pointed out above, this "two-day" argument is completely misleading. While Mr. Hill may not have been "surprised" at the nature of the contract, like any other purchaser of an automobile from a reputable dealer, he was most certainly surprised, and unfairly so, when the car broke down minutes after leaving the plaintiff's lot and when the dealer refused any assistance of any kind.

The plaintiff goes on to assert that the "Buyer's Guide" required by the Federal Trade Commission "was developed . . . to better establish buyer and seller responsibilities." While this may be the result desired by automobile dealers, it most certainly was not the reason for the development of the Buyer's Guide. Rather, due to the unscrupulous sales activities of dealers of used automobiles who would make oral representations of quality and warranty only to disclaim them in the sales

contract, the FTC promulgated the regulation requiring the Buyer's Guide in order to prevent these "unfair and deceptive acts or practices . . . ." 16 C.F.R. § 455(a)(b)and(c). The obvious intent of this regulation is to protect the consumer, and interestingly, the plaintiff now attempts to use the regulation as a sword, forcing Mr. Hill into an entirely one-sided bargain, which no reasonable person would view without seeing its injustice. The federal regulation, in any event, should not supplant the applicable provisions of Utah law cited in this Brief.

In its final argument, the plaintiff points out that the UCC requires that the parties "be afforded a reasonable opportunity to present evidence" as to the commercial setting of the contract. UCA 70A-2-302(2). This, the plaintiff argues, is reversable error.

This argument call for two responses. First, the transaction in question is one with which nearly all adults in our society are familiar, and its commercial setting is one of which a court may take judicial notice. Second, and perhaps finally arriving at the crux of the reason for this appeal, under the U.C.C. the plaintiff is entitled only to a "reasonable" opportunity to present evidence. As stated at the initiation of this Brief, in a Motion for Summary Judgment, the party moved against has the obligation to submit affidavits or other sworn sub-

missions which raise genuine issues of material fact. When the party fails to do so, he is deemed to have admitted the facts asserted by the movant, and has waived his right to contest those facts. Franklin Financial, supra. Moreover, since the plaintiff has failed to file opposing affidavits, the Court may assume that no material facts exist which would counter those submitted by the defendant. The plaintiff waived its right to raise additional facts on the issue of unconscionability, and inasmuch as the facts before the Court show a bargain so oppressive and one-sided that any fair-minded person would be affected with a profound sense of injustice, the decision of the Circuit Court should be affirmed and this appeal dismissed.

B. The Plaintiff Breached the Implied Warranty of Merchantability

The language attempting to exclude all express and implied warranties is unconscionable and hence, unenforceable. Therefore, at minimum, the transaction is clothed with implied warranties of merchantability and fitness for purpose. Under the provisions of the Uniform Commercial Code, for goods to be merchantable they must be fit for the ordinary purposes for which such goods are used. In Testo v. Russ Dunmire Oldsmobile, Inc., 554 P.2d 349 (Wash. App. 1976), the Court addressed the question of merchantability and used automobiles. Referring to the commentary to § 2-314 of the U.C.C., the Court stated that "The measure of a used car's merchantability turns . . . on its

operative qualities," 554 P.2d at 354, and went on to state that "[to] be fit for the purpose of driving, a four-year old automobile . . must be in reasonably safe condition and substantially free of defects which render it inoperable." Id. Under facts showing substantial defects in the car, the Court held that since the car did not meet this standard it was not "merchantable" within the meaning of § 2-314 of the U.C.C.

Applying this test to the present case, it is clear that the vehicle sold by the plaintiff was not merchantable because, as in the Testo case, after only a short period of time, the car would not operate due to latent defects. Therefore, Mr. Hill is entitled to his remedies under the Code, including cancellation of the contract. U.C.A. § 70A-2-711.

CONCLUSION

At the time Mr. Hill's Motion for Summary Judgment was heard by the Circuit Court, the facts before the Court were undisputed. Those same facts are before this Court in the Record on Appeal and the plaintiff cannot now belatedly present additional facts not supported by the Record. The contract for the purchase of the automobile was cancelled by Mr. Hill due to his rejection of its delivery, or his revocation of its acceptance. Moreover, the contract was voidable under the doctrine of failure of consideration. Finally, by virtue of the contract's unconscionability, the contract should be clothed with the

implied warranty of merchantability, the breach of which entitled Mr. Hill to cancel the contract.

Any of the theories of relief set forth above is sufficient to affirm the judgment of the Eighth Circuit Court.

DATED this 28 day of October, 1987.

MAZURAN, VERHAAREN & HAYES, P.C.
Attorneys for Charles P. Hill

By /s/
MARK F. BELL

CERTIFICATE OF MAILING

I hereby certify that on this 28 day of October, 1987, pursuant to Rule 26(b) of the Rules of the Utah Court of Appeals, true and correct copies of the foregoing Brief of Respondent were served upon Michael J. Petro, attorney for plaintiff, Harris & Carter, 3325 North University Avenue, Suite 200, Jamestown Square, Provo, Utah, 84604.

/s/

ADDENDUM

§ 2—106. Definitions: "Contract"; "Agreement"; "Contract for Sale"; "Sale"; "Present Sale"; "Conforming" to Contract; "Termination"; "Cancellation"

(1) In this Article unless the context otherwise requires "contract" and "agreement" are limited to those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price (Section 2—401). A "present sale" means a sale which is accomplished by the making of the contract.

(2) Goods or conduct including any part of a performance are "conforming" or conform to the contract when they are in accordance with the obligations under the contract.

(3) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

(4) "Cancellation" occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of "termination" except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance.

Official Comment

Prior Uniform Statutory Provision: Subsection (1)—Section 1 (1) and (2), Uniform Sales Act; Subsection (2)—none, but subsection generally continues policy of Sections 11, 44 and 69, Uniform Sales Act; Subsections (3) and (4)—none.

Changes: Completely rewritten.

Purposes of Changes and New Matter:

1. Subsection (1): "Contract for sale" is used as a general concept throughout this Article, but the rights of the parties do not vary according to whether the transaction is a present sale or a contract to sell unless the Article expressly so provides.

2. Subsection (2): It is in general intended to continue the policy of requiring exact performance by the seller of his obligations as a condition to his right to require acceptance. However, the seller is in part safeguarded against surprise as a result of sudden technicality on the buyer's part by the provisions of Section 2—508 on seller's cure of improper tender or delivery. Moreover usage of trade frequently permits commercial leeways in performance and the language of the agreement itself must be read in the light of such custom or usage and also, prior course of dealing, and in a long term contract, the course of performance.

3. Subsections (3) and (4): These subsections are intended to make clear the distinction carried forward throughout this Article between termination and cancellation.

Cross References:

Point 2: Sections 1—203, 1—205, 2—208 and 2—508.

Definitional Cross References:

"Agreement". Section 1—201.
"Buyer". Section 2—103.
"Contract". Section 1—201.
"Goods". Section 2—105.
"Party". Section 1—201.
"Remedy". Section 1—201.
"Rights". Section 1—201.
"Seller". Section 2—103.

§ 2—302. Unconscionable Contract or Clause

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Official Comment

Prior Uniform Statutory Provision: None.

Purposes:

1. This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Subsection (2) makes it clear that it is proper for the court to hear evidence upon these questions. The principle is one of the prevention of oppression and unfair surprise (Cf. Campbell Soup Co. v. Wentz, 172 F 2d 80, 3d Cir. 1948) and not of disturbance of allocation of risks because of superior bargaining power. The underlying basis of this section is illustrated by the results in cases such as the following:

Kansas City Wholesale Grocery Co. v. Weber Packing Corporation, 93 Utah 414, 73 P.2d 1272 (1937), where a clause limiting time for complaints was held inapplicable to latent defects in a shipment of catsup which could be discovered only by microscopic analysis; Hardy v. General Motors Acceptance Corporation, 38 Ga App. 463, 144 S.E 327 (1928), holding that a disclaimer of warranty clause applied only to express warranties, thus letting in a fair implied warranty; Andrews Bros. v. Singer & Co (1934 CA) 1 K B. 17, holding that where a car with substantial mileage was delivered instead of a "new" car, a disclaimer of warranties, including those "implied," left unaffected an "express obligation" on the description, even though the Sale of Goods Act called such an implied warranty; New Prague Flouring Mill Co v. G A. Spears, 194 Iowa 417, 189 N W. 815 (1922), holding that a clause permitting the seller, upon the buyer's failure to supply shipping instructions, to cancel, ship, or allow delivery date to be indefinitely postponed 30 days at a time by the inaction, does not indefinitely postpone the date of measuring damages for the buyer's breach, to the

seller's advantage; and Kansas Flour Mills Co. v. Dirks, 100 Kan. 376, 164 P. 273 (1917), where under a similar clause in a rising market the court permitted the buyer to measure his damages for non-delivery at the end of only one 30 day postponement; Green v. Arcos, Ltd. (1931 CA) 47 T.L.R. 336, where a blanket clause prohibiting rejection of shipments by the buyer was restricted to apply to shipments where discrepancies represented merely mercantile variations; Meyer v. Packard Cleveland Motor Co., 106 Ohio St. 328, 140 N.E. 118 (1922), in which the court held that a "waiver" of all agreements not specified did not preclude implied warranty of fitness of a rebuilt dump truck for ordinary use as a dump truck; Austin Co. v. J. H. Tillman Co, 104 Or 541, 209 P. 131 (1922), where a clause limiting the buyer's remedy to return was held to be applicable only if the seller had delivered a machine needed for a construction job which reasonably met the contract description; Bekkevold v. Potts, 173 Minn 87, 216 N.W. 790, 59 A.L.R. 1164 (1927), refusing to allow warranty of fitness for purpose imposed by law to be negated by clause excluding all warranties "made" by the seller; Robert A. Munroe & Co. v. Meyer (1930) 2 K.B. 312, holding that the warranty of description overrides a clause reading "with all faults and defects" where adulterated meat not up to the contract description was delivered.

2. Under this section the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability, or it may strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement, or it may simply limit unconscionable clauses so as to avoid unconscionable results.

3. The present section is addressed to the court, and the decision is to be made by it. The commercial evidence referred to in subsection (2) is for the court's consideration, not the jury's. Only the agreement which results from the court's action on these matters is to be submitted to the general triers of the facts.

Definitional Cross Reference:

"Contract". Section 1—201.

§ 2—313. Express Warranties by Affirmation, Promise, Description, Sample

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or

"guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Official Comment

Prior Uniform Statutory Provision: Sections 12, 14 and 16, Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes: To consolidate and systematize basic principles with the result that:

1. "Express" warranties rest on "dickered" aspects of the individual bargain, and go so clearly to the essence of that bargain that words of disclaimer in a form are repugnant to the basic dickered terms. "Implied" warranties rest so clearly on a common factual situation or set of conditions that no particular language or action is necessary to evidence them and they will arise in such a situation unless unmistakably negated.

This section reverts to the older case law insofar as the warranties of description and sample are designated "express" rather than "implied".

2. Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire, whether such bailment is itself the main contract or is merely a supplying of containers under a contract for the sale of their contents. The provisions of Section 2—318 on third party beneficiaries expressly recognize this case law development within one particular area. Beyond that, the matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.

3. The present section deals with affirmations of fact by the seller, descriptions of the goods or exhibitions of samples, exactly as any other part of a negotiation which ends in a contract is dealt with. No specific intention to make a warranty is necessary if any of these factors is made part of the basis of the bargain. In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods, hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made, out of the agreement requires clear affirmative proof. The issue normally is one of fact.

4. In view of the principle that the whole purpose of the law of warranty is to determine

what it is that the seller has in essence agreed to sell, the policy is adopted of those cases which refuse except in unusual circumstances to recognize a material deletion of the seller's obligation. Thus, a contract is normally a contract for a sale of something describable and described. A clause generally disclaiming "all warranties, express or implied" cannot reduce the seller's obligation with respect to such description and therefore cannot be given literal effect under Section 2—316.

This is not intended to mean that the parties, if they consciously desire, cannot make their own bargain as they wish. But in determining what they have agreed upon good faith is a factor and consideration should be given to the fact that the probability is small that a real price is intended to be exchanged for a pseudo-obligation.

5. Paragraph (1) (b) makes specific some of the principles set forth above when a description of the goods is given by the seller.

A description need not be by words. Technical specifications, blueprints and the like can afford more exact description than mere language and if made part of the basis of the bargain goods must conform with them. Past deliveries may set the description of quality, either expressly or impliedly by course of dealing. Of course, all descriptions by merchants must be read against the applicable trade usages with the general rules as to merchantability resolving any doubts.

6. The basic situation as to statements affecting the true essence of the bargain is no different when a sample or model is involved in the transaction. This section includes both a "sample" actually drawn from the bulk of goods which is the subject matter of the sale, and a "model" which is offered for inspection when the subject matter is not at hand and which has not been drawn from the bulk of the goods.

Although the underlying principles are unchanged, the facts are often ambiguous when something is shown as illustrative, rather than as a straight sample. In general, the presumption is that any sample or model just as any affirmation of fact is intended to become a basis of the bargain. But there is no escape from the question of fact. When the seller exhibits a sample purporting to be drawn from an existing bulk, good faith of course requires that the sample be fairly drawn. But in mercantile experience the mere exhibition of a "sample" does not of itself show whether it is merely intended to "suggest" or to "be" the character of the subject-matter of the contract. The question is whether the seller has so acted with reference to the sample as to make him responsible that the whole shall have at least the values shown by it. The circumstances aid in answering this question. If the sample has been drawn from an existing bulk, it must be regarded as describing values of the goods contracted for unless it is accompanied by an unmistakable denial of such responsibility. If, on the other

hand, a model of merchandise not on hand is offered, the mercantile presumption that it has become a literal description of the subject matter is not so strong, and particularly so if modification on the buyer's initiative impairs any feature of the model.

7. The precise time when words of description or affirmation are made or samples are shown is not material. The sole question is whether the language or samples or models are fairly to be regarded as part of the contract. If language is used after the closing of the deal (as when the buyer when taking delivery asks and receives an additional assurance), the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order (Section 2—209).

8. Concerning affirmations of value or a seller's opinion or commendation under subsection (2), the basic question remains the same: What statements of the seller have in the circumstances and in objective judgment become part of the basis of the bargain? As indicated above, all of the statements of the seller do so unless good reason is shown to the contrary. The provisions of subsection (2) are included, however, since common experience discloses that some statements or predictions cannot fairly be viewed as entering into the bargain. Even as to false statements of value, however, the possibility is left open that a remedy may be provided by the law relating to fraud or misrepresentation.

Cross References:

Point 1: Section 2—316.
Point 2: Sections 1—102(3) and 2—318.
Point 3: Section 2—316(2)(b).
Point 4: Section 2—316.
Point 5: Sections 1—205(4) and 2—314.
Point 6: Section 2—316.
Point 7: Section 2—209.
Point 8: Section 1—103.

Definitional Cross References:

"Buyer". Section 2—103.
"Conforming". Section 2—106.
"Goods". Section 2—105.
"Seller". Section 2—103.

§ 2—314. Implied Warranty: Merchantability; Usage of Trade

(1) Unless excluded or modified (Section 2—316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2—316) other implied warranties may arise from course of dealing or usage of trade.

Official Comment

Prior Uniform Statutory Provision: Section 15(2), Uniform Sales Act.

Changes: Completely rewritten.

Purposes of Changes: This section, drawn in view of the steadily developing case law on the subject, is intended to make it clear that:

1. The seller's obligation applies to present sales as well as to contracts to sell subject to the effects of any examination of specific goods. (Subsection (2) of Section 2—316). Also, the warranty of merchantability applies to sales for use as well as to sales for resale.

2. The question when the warranty is imposed turns basically on the meaning of the terms of the agreement as recognized in the trade. Goods delivered under an agreement made by a merchant in a given line of trade must be of a quality comparable to that generally acceptable in that line of trade under the description or other designation of the goods used in the agreement. The responsibility imposed rests on any merchant-seller, and the absence of the words "grower or manufacturer or not" which appeared in Section 15(2) of the Uniform Sales Act does not restrict the applicability of this section.

3. A specific designation of goods by the buyer does not exclude the seller's obligation that they be fit for the general purposes appropriate to such goods. A contract for the sale of second-hand goods, however, involves only such obligation as is appropriate to such goods for that is their contract description. A person making an isolated sale of goods is not a "merchant" within the meaning of the full scope of this section and, thus, no warranty of merchantability would apply. His knowledge of any defects not apparent on inspection would, however, without need for express agreement and in keeping with the underlying reason of the present section and the pro-

visions on good faith, impose an obligation that known material but hidden defects be fully disclosed.

4. Although a seller may not be a "merchant" as to the goods in question, if he states generally that they are "guaranteed" the provisions of this section may furnish a guide to the content of the resulting express warranty. This has particular significance in the case of second-hand sales, and has further significance in limiting the effect of fine-print disclaimer clauses where their effect would be inconsistent with large-print assertions of "guarantee".

5. The second sentence of subsection (1) covers the warranty with respect to food and drink. Serving food or drink for value is a sale, whether to be consumed on the premises or elsewhere. Cases to the contrary are rejected. The principal warranty is that stated in subsections (1) and (2) (c) of this section.

6. Subsection (2) does not purport to exhaust the meaning of "merchantable" nor to negate any of its attributes not specifically mentioned in the text of the statute, but arising by usage of trade or through case law. The language used is "must be at least such as . . . ," and the intention is to leave open other possible attributes of merchantability.

7. Paragraphs (a) and (b) of subsection (2) are to be read together. Both refer, as indicated above, to the standards of that line of the trade which fits the transaction and the seller's business. "Fair average" is a term directly appropriate to agricultural bulk products and means goods centering around the middle belt of quality, not the least or the worst that can be understood in the particular trade by the designation, but such as can pass "without objection." Of course a fair percentage of the least is permissible but the goods are not "fair average" if they are all of the least or worst quality possible under the description. In cases of doubt as to what quality is intended, the price at which a merchant closes a contract is an excellent index of the nature and scope of his obligation under the present section.

8. Fitness for the ordinary purposes for which goods of the type are used is a fundamental concept of the present section and is covered in paragraph (c). As stated above, merchantability is also a part of the obligation owing to the purchaser for use. Correspondingly, protection, under this aspect of the warranty, of the person buying for resale to the ultimate consumer is equally necessary, and merchantable goods must therefore be "honestly" resalable in the normal course of business because they are what they purport to be.

9. Paragraph (d) on evenness of kind, quality and quantity follows case law. But precautionary language has been added as a reminder of the frequent usages of trade which permit substantial variations both with and without an allowance or an obligation to replace the varying units.

10. Paragraph (e) applies only where the nature of the

goods and of the transaction require a certain type of container, package or label. Paragraph (f) applies, on the other hand, wherever there is a label or container on which representations are made, even though the original contract, either by express terms or usage of trade, may not have required either the labelling or the representation. This follows from the general obligation of good faith which requires that a buyer should not be placed in the position of reselling or using goods delivered under false representations appearing on the package or container. No problem of extra consideration arises in this connection since, under this Article, an obligation is imposed by the original contract not to deliver mislabeled articles, and the obligation is imposed where mercantile good faith so requires and without reference to the doctrine of consideration.

11. Exclusion or modification of the warranty of merchantability, or of any part of it, is dealt with in the section to which the text of the present section makes explicit precautionary references. That section must be read with particular reference to its subsection (4) on limitation of remedies. The warranty of merchantability, wherever it is normal, is so commonly taken for granted that its exclusion from the contract is a matter threatening surprise and therefore requiring special precaution.

12. Subsection (3) is to make explicit that usage of trade and course of dealing can create warranties and that they are implied rather than express warranties and thus subject to exclusion or modification under Section 2—316. A typical instance would be the obligation to provide pedigree papers to evidence conformity of the animal to the contract in the case of a pedigreed dog or blooded bull.

13. In an action based on breach of warranty, it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained. In such an action an affirmative showing by the seller that the loss resulted from some action or event following his own delivery of the goods can operate as a defense. Equally, evidence indicating that the seller exercised care in the manufacture, processing or selection of the goods is relevant to the issue of whether the warranty was in fact broken. Action by the buyer following an examination of the goods which ought to have indicated the defect complained of can be shown as matter bearing on whether the breach itself was the cause of the injury.

Cross References:

Point 1: Section 2—316.

Point 3: Sections 1—203 and 2—104.

Point 5: Section 2—315.

Point 11: Section 2—316.

Point 12: Sections 1—201, 1—205 and 2—316.

Definitional Cross References:

"Agreement". Section 1—201.

"Contract". Section 1—201.

"Contract for sale". Section 2—106.

"Goods". Section 2—105.

"Merchant". Section 2—104

"Seller". Section 2—103.

§ 2—316. Exclusion or Modification of Warranties

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2—202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2—718 and 2—719).

Official Comment

Prior Uniform Statutory Provision: None. See sections 15 and 71, Uniform Sales Act.

Purposes:

1. This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude "all warranties, express or implied." It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise.

2. The seller is protected under this Article against false allegations of oral warranties by its provisions on parol and extrinsic evidence and against unauthorized representations by the customary "lack of author-

ity" clauses. This Article treats the limitation or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty. If no warranty exists, there is of course no problem of limiting remedies for breach of warranty. Under subsection (4) the question of limitation of remedy is governed by the sections referred to rather than by this section.

3. Disclaimer of the implied warranty of merchantability is permitted under subsection (2), but with the safeguard that such disclaimers must mention merchantability and in case of a writing must be conspicuous.

4. Unlike the implied warranty of merchantability, implied warranties of fitness for a particular purpose may be excluded by general language, but only if it is in writing and conspicuous.

5. Subsection (2) presupposes that the implied warranty in question exists unless excluded or modified. Whether or not language of disclaimer satisfies the requirements of this section, such language may be relevant under other sections to the question whether the warranty was ever in fact created. Thus, unless the provisions of this Article on parol and extrinsic evidence prevent, oral language of disclaimer may raise issues of fact as to whether reliance by the buyer occurred and whether the seller had "reason to know" under the section on implied warranty of fitness for a particular purpose.

6. The exceptions to the general rule set forth in paragraphs (a), (b) and (c) of subsection (3) are common factual situations in which the circumstances surrounding the transaction are in themselves sufficient to call the buyer's attention to the fact that no implied warranties are made or that a certain implied warranty is being excluded.

7. Paragraph (a) of subsection (3) deals with general terms such as "as is," "as they stand," "with all faults," and the like. Such terms in ordinary commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved. The terms covered by paragraph (a) are in fact merely a particularization of paragraph (c) which provides for exclusion or modification of implied warranties by usage of trade.

8. Under paragraph (b) of subsection (3) warranties may be excluded or modified by the circumstances where the buyer examines the goods or a sample or model of them before entering into the contract. "Examination" as used in this paragraph is not synonymous with inspection before acceptance or at any other time after the contract has been made. It goes rather to the nature of the responsibility assumed by the seller at the time of the making of the contract. Of course if the buyer discovers the defect and uses the goods anyway, or if he unreasonably fails to examine the goods before he uses them, resulting injuries may be found to result from his own action rather than proximately from a breach of warranty. See Sections 2—314 and 2—715 and comments thereto.

In order to bring the transaction within the scope of "refused to examine" in paragraph (b), it is not sufficient that the goods are available for inspection. There must in addition be a demand by the seller that the buyer examine the goods fully. The seller by the demand puts the buyer on notice that he is assuming the risk of defects which the examination ought to reveal. The language "refused to examine" in this paragraph is intended to make clear the necessity for such demand.

Application of the doctrine of "caveat emptor" in all cases where the buyer examines the goods regardless of statements made by the seller is, however, rejected by this Article. Thus, if the offer of examination is accompanied by words as to their merchantability or specific attributes and the buyer indicates clearly that he is relying on those words rather than on his examination, they give rise to an "express" warranty. In such cases the question is one of fact as to whether a warranty of merchantability has been expressly incorporated in the agreement. Disclaimer of such an express warranty is governed by subsection (1) of the present section.

The particular buyer's skill and the normal method of examining goods in the circumstances determine what defects are excluded by the examination. A failure to notice defects which are obvious cannot excuse the buyer. However, an examination under circumstances which do not permit chemical or other testing of the goods would not exclude defects which could be ascertained only by such testing. Nor can latent defects be excluded by a simple examination. A professional buyer examining a product in his field will be held to have assumed the risk as to all defects which a professional in the field ought to observe, while a nonprofessional buyer will be held to have assumed the risk only for such defects as a layman might be expected to observe.

9. The situation in which the buyer gives precise and complete specifications to the seller is not explicitly covered in this section, but this is a frequent circumstance by which the implied warranties may be excluded. The warranty of fitness for a particular purpose would not normally arise since in such a situation there is usually no reliance on the seller by the buyer. The warranty of merchantability in such a transaction, however, must be considered in connection with the next section on the cumulation and conflict of warranties. Under paragraph (c) of that section in case of such an inconsistency the implied warranty of merchantability is displaced by the express warranty that the goods will comply with the specifications. Thus, where the buyer gives detailed specifications as to the goods, neither of the implied warranties as to quality will normally apply to the transaction unless consistent with the specifications.

Cross References:

Point 2: Sections 2–202, 2—718 and 2—719.

Point 7: Sections 1—205 and 2—208.

§ 2—601. Buyer's Rights on Improper Delivery

Subject to the provisions of this Article on breach in installment contracts (Section 2—612) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2—718 and 2—719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

(a) reject the whole; or

(b) accept the whole; or

(c) accept any commercial unit or units and reject the rest.

Official Comment

Prior Uniform Statutory Provision: No one general equivalent provision but numerous provisions, dealing with situations of non-conformity where buyer may accept or reject, including Sections 11, 44 and 69(1), Uniform Sales Act.

Changes: Partial acceptance in good faith is recognized and the buyer's remedies on the contract for breach of warranty and the like, where the buyer has returned the goods after transfer of title, are no longer barred.

Purposes of Changes: To make it clear that:

1. A buyer accepting a nonconforming tender is not penalized by the loss of any remedy otherwise open to him. This policy extends to cover and regulate the acceptance of a part of any lot improperly tendered in any case where the price can reasonably be apportioned. Partial acceptance is permitted whether the part of the goods accepted conforms or not. The only limitation on partial acceptance is that good faith and commercial reasonableness must be used to avoid undue impairment of the value of the remaining portion of the goods. This is the reason for the insistence on the "commercial unit" in paragraph (c). In this respect, the test is not only what unit has been the basis of contract, but whether the partial acceptance produces so materially adverse an effect on the remainder as to constitute bad faith.

2. Acceptance made with the knowledge of the other party is final. An original refusal to accept may be withdrawn by a later acceptance if the seller has indicated that he is holding the tender open. However, if the buyer attempts to accept, either in whole or in part, after his original rejection has caused the seller to arrange for other disposition of the goods, the buyer must answer for any ensuing damage since the next section provides that any exercise of ownership after rejection is wrongful as against the seller. Further, he is liable even though the seller

may choose to treat his action as acceptance rather than conversion, since the damage flows from the misleading notice. Such arrangements for resale or other disposition of the goods by the seller must be viewed as within the normal contemplation of a buyer who has given notice of rejection. However, the buyer's attempts in good faith to dispose of defective goods where the seller has failed to give instructions within a reasonable time are not to be regarded as an acceptance.

Cross References:

Sections 2—602(2) (a), 2—612, 2—718 and 2—719.

Definitional Cross References:

"Buyer". Section 2—103.

"Commercial unit". Section 2—105.

"Conform". Section 2—106.

"Contract". Section 1—201.

"Goods". Section 2—105.

"Installment contract". Section 2—612.

"Rights". Section 1—201.

§ 2—602. Manner and Effect of Rightful Rejection

(1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

(2) Subject to the provisions of the two following sections on rejected goods (Sections 2—603 and 2—604),

(a) after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and

(b) if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this Article (subsection (3) of Section 2—711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but

(c) the buyer has no further obligations with regard to goods rightfully rejected.

(3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this Article on Seller's remedies in general (Section 2—703).

Official Comment

Prior Uniform Statutory Provision: Section 50, Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes: To make it clear that:

1. A tender or delivery of goods made pursuant to a contract of sale, even though wholly

non-conforming, requires affirmative action by the buyer to avoid acceptance. Under subsection (1), therefore, the buyer is given a reasonable time to notify the seller of his rejection, but without such seasonable notification his rejection is ineffective. The sections of this Article dealing with inspection of goods must be read in connection with the buyer's reasonable time for action under this subsection. Contract provisions limiting the time for rejection fall within the rule of the section on "Time" and are effective if the time set gives the buyer a reasonable time for discovery of defects. What constitutes a due "notifying" of rejection by the buyer to the seller is defined in Section 1—201.

2. Subsection (2) lays down the normal duties of the buyer upon rejection, which flow from the relationship of the parties. Beyond his duty to hold the goods with reasonable care for the buyer's [seller's] disposition, this section continues the policy of prior uniform legislation in generally relieving the buyer from any duties with respect to them, except when the circumstances impose the limited obligation of salvage upon him under the next section.

3. The present section applies only to rightful rejection by the buyer. If the seller has made a tender which in all respects conforms to the contract, the buyer has a positive duty to accept and his failure to do so constitutes a "wrongful rejection" which gives the seller immediate remedies for breach. Subsection (3) is included here to emphasize the sharp distinction between the rejection of an improper tender and the non-acceptance which is a breach by the buyer.

4. The provisions of this section are to be appropriately limited or modified when a negotiation is in process.

Cross References:

Point 1: Sections 1—201, 1—204(1) and (3), 2—512(2), 2—513(1) and 2—606(1) (b).

Point 2: Section 2—603(1).

Point 3: Section 2—703.

Definitional Cross References:

"Buyer". Section 2—103.

"Commercial unit". Section 2—105.

"Goods". Section 2—105.

"Merchant". Section 2—104.

"Notifies". Section 1—201.

"Reasonable time". Section 1—204.

"Remedy". Section 1—201.

"Rights". Section 1—201.

"Seasonably". Section 1—204.

"Security interest". Section 1—201.

"Seller". Section 2—103.

§ 2—606. What Constitutes Acceptance of Goods

(1) Acceptance of goods occurs when the buyer

(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or

(b) fails to make an effective rejection (subsection (1) of Section 2—602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

Official Comment

Prior Uniform Statutory Provision: Section 48, Uniform Sales Act.

Changes: Rewritten, the qualification in paragraph (c) and subsection (2) being new; other-

wise the general policy of the prior legislation is continued.

Purposes of Changes and New Matter: To make it clear that:

1. Under this Article "acceptance" as applied to goods means that the buyer, pursuant to the contract, takes particular goods which have been appropriated to the contract as his own, whether or not he is obligated to do so, and whether he does so by words, action, or silence when it is time to speak. If the goods conform to the contract, acceptance amounts only to the performance by the buyer of one part of his legal obligation.

2. Under this Article acceptance of goods is always acceptance of identified goods which have been appropriated to the contract or are appropriated by the contract. There is no provision for "acceptance of title" apart from acceptance in general, since acceptance of title is not material under this Article to the detailed rights and duties of the parties. (See Section 2—401). The refinements of the older law between acceptance of goods and of title become unnecessary in view of the provisions of the sections on effect and revocation of acceptance, on effects of identification and on risk of loss, and those sections which free the seller's and buyer's remedies from the complications and confusions caused by the question of whether title has or has not passed to the buyer before breach.

3. Under paragraph (a), payment made after tender is always one circumstance tending to signify acceptance of the goods but in itself it can never be more than one circumstance and is not conclusive. Also, a conditional communication of acceptance always remains subject to its expressed conditions.

4. Under paragraph (c), any action taken by the buyer, which is inconsistent with his claim that he has rejected the goods, constitutes an acceptance. However, the provisions of paragraph (c) are subject to the sections dealing with rejection by the buyer which permit the buyer to take certain actions with respect to the goods pursuant to his options and duties imposed by those sections, without effecting an acceptance of the goods. The second clause of paragraph (c) modifies some of the prior case law and makes it clear that "acceptance" in law based on the wrongful act of the acceptor is acceptance only as against the wrongdoer and then only at the option of the party wronged.

In the same manner in which a buyer can bind himself, despite his insistence that he is rejecting or has rejected the goods, by an act inconsistent with the seller's ownership under paragraph (c), he can obligate himself by a communication of acceptance despite a prior rejection under paragraph (a). However, the sections on buyer's rights on improper delivery and on the effect of rightful rejection, make it clear that after he once rejects a tender, paragraph (a) does not operate in favor of the buyer unless the seller has re-tendered the goods or has taken affirmative action indicating that he is holding the tender open. See also Comment 2 to Section 2—601.

5. Subsection (2) supplements the policy of the section on buyer's rights on improper delivery, recognizing the validity of a partial acceptance but insisting that the buyer exercise this right only as to whole commercial units.

Cross References:

Point 2: Sections 2—401, 2—509, 2—510, 2—607, 2—608 and Part 7.

Point 4: Sections 2—601 through 2—604.

Point 5: Section 2—601

Definitional Cross References:

"Buyer". Section 2—103.

"Commercial unit". Section 2—105.

"Goods". Section 2—105.

"Seller". Section 2—103.

§ 2—607. Effect of Acceptance; Notice of Breach; Burden of Establishing Breach After Acceptance; Notice of Claim or Litigation to Person Answerable Over

(1) The buyer must pay at the contract rate for any goods accepted.

(2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a non-conformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the non-conformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this Article for non-conformity.

(3) Where a tender has been accepted

(a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and

(b) if the claim is one for infringement or the like (subsection (3) of Section 2—312) and the buyer is sued as a result of such a breach he must so notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

(4) The burden is on the buyer to establish any breach with respect to the goods accepted.

(5) Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over

(a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and de-

fend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after seasonable receipt of the notice does come in and defend he is so bound.

(b) if the claim is one for infringement or the like (subsection (3) of Section 2—312) the original seller may demand in writing that his buyer turn over to him control of the litigation including settlement or else be barred from any remedy over and if he also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer after seasonable receipt of the demand does turn over control the buyer is so barred.

(6) The provisions of subsections (3), (4) and (5) apply to any obligation of a buyer to hold the seller harmless against infringement or the like (subsection (3) of Section 2—312).

Official Comment

Prior Uniform Statutory Provision: Subsection (1)—Section 41, Uniform Sales Act; Subsections (2) and (3)—Sections 49 and 69, Uniform Sales Act.

Changes: Rewritten.

Purposes of Changes: To continue the prior basic policies with respect to acceptance of goods while making a number of minor though material changes in the interest of simplicity and commercial convenience so that:

1. Under subsection (1), once the buyer accepts a tender the seller acquires a right to its price on the contract terms. In cases of partial acceptance, the price of any part accepted is, if possible, to be reasonably apportioned, using the type of apportionment familiar to the courts in quantum valebat cases, to be determined in terms of "the contract rate," which is the rate determined from the bargain in fact (the agreement) after the rules and policies of this Article have been brought to bear.

2. Under subsection (2) acceptance of goods precludes their subsequent rejection. Any return of the goods thereafter must be by way of revocation of acceptance under the next section. Revocation is unavailable for a non-conformity known to the buyer at the time of acceptance, except where the buyer has accepted on the reasonable assumption that the non-conformity would be seasonably cured.

3. All other remedies of the buyer remain unimpaired under subsection (2). This is intended to include the buyer's full rights with respect to future installments despite his acceptance of any earlier non-conforming installment.

4. The time of notification is to be determined by applying commercial standards to a merchant buyer. "A reasonable time" for notification from a re-

tail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.

The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer, as under the section covering statements of defects upon rejection (Section 2—605). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.

5. Under this Article various beneficiaries are given rights for injuries sustained by them because of the seller's breach of warranty. Such a beneficiary does not fall within the reason of the present section in regard to discovery of defects and the giving of notice within a reasonable time after acceptance, since he has nothing to do with acceptance. However, the reason of this section does extend to requiring the beneficiary to notify the seller that an injury has occurred. What is said above, with regard to the extended time for reasonable notification from the lay consumer after the injury is also applicable here; but even a beneficiary can be properly held to the use of good faith in notifying, once he has had time to become aware of the legal situation.

6. Subsection (4) unambiguously places the burden of proof to establish breach on the buyer after acceptance. However, this rule becomes one purely of procedure when the tender accepted was non-conforming and the buyer has given the seller notice of breach under subsection (3). For subsection (2) makes it clear that acceptance leaves unimpaired the buyer's right to be made whole, and that right can be exercised by the buyer not only by way of cross-claim for damages, but also by way of recoupment in diminution or extinction of the price.

7. Subsections (3) (b) and (5) (b) give a warrantor against infringement an opportunity to defend or compromise third-party claims or be relieved of his liability. Subsection (5) (a) codifies for all warranties the practice of voucher to defend. Compare Section 3—803. Subsection (6) makes these provisions applicable to the buyer's liability for infringement under Section 2—312.

8. All of the provisions of the present section are subject to any explicit reservation of rights.

Cross References:

Point 1: Section 1—201.
Point 2: Section 2—608.
Point 4: Sections 1—204 and 2—605.

Point 5: Section 2—318.
Point 6: Section 2—717
Point 7: Sections 2—312 and 3—803
Point 8: Section 1—207.

Definitional Cross References:

"Burden of establishing". Section 1—201.
"Buyer". Section 2—103.
"Conform". Section 2—106.
"Contract". Section 1—201.
"Goods". Section 2—105.
"Notifies". Section 1—201.
"Reasonable time". Section 1—204.
"Remedy". Section 1—201.
"Seasonably". Section 1—204.

§ 2—608. Revocation of Acceptance in Whole or in Part

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

Official Comment

Prior Uniform Statutory Provision: Section 69(1) (d), (3), (4) and (5), Uniform Sales Act

Changes: Rewritten

Purposes of Changes: To make it clear that

1 Although the prior basic policy is continued, the buyer is no longer required to elect between revocation of acceptance and recovery of damages for breach Both are now available to him The non-alternative character of the two remedies is stressed by the terms used in the present section The section no longer speaks of 'rescission," a term capable of ambiguous application either to transfer of title to the goods or to the contract of sale and susceptible also of confusion with cancellation for cause of an executed or executory portion of the contract The remedy under this section is instead referred to simply as "revocation of acceptance" of goods tendered under a contract for sale and involves no suggestion of "election' of any sort.

2. Revocation of acceptance is possible only where the non-conformity substantially impairs the value of the goods to the buyer. For this purpose the test is not what the seller had reason to know at the time of contracting; the question is whether the non-conformity is such as will in fact cause a substantial impairment of value to the buyer though the seller had no advance knowledge as to the buyer's particular circumstances.

3. "Assurances" by the seller under paragraph (b) of subsection (1) can rest as well in the circumstances or in the contract as in explicit language used at the time of delivery. The reason for recognizing such assurances is that they induce the buyer to delay discovery. These are the only assurances involved in paragraph (b). Explicit assurances may be made either in good faith or bad faith. In either case any remedy accorded by this Article is available to the buyer under the section on remedies for fraud.

4. Subsection (2) requires notification of revocation of acceptance within a reasonable time after discovery of the grounds for such revocation. Since this remedy will be generally resorted to only after attempts at adjustment have failed, the reasonable time period should extend in most cases beyond the time in which notification of breach must be given, beyond the time for discovery of non-conformity after acceptance and beyond the time for rejection after tender. The parties may by their agreement limit the time for notification under this section, but the same sanctions and considerations apply to such agreements as are discussed in the comment on manner and effect of rightful rejection.

5. The content of the notice under subsection (2) is to be determined in this case as in others by considerations of good faith, prevention of surprise, and reasonable adjustment. More will generally be necessary than the mere notification of breach required under the preceding section. On the other hand the requirements of the section on waiver of buyer's objections do not apply here. The fact that quick notification of trouble is desirable affords good ground for being slow to bind a buyer by his first statement. Following the general policy of this Article, the requirements of the content of notification are less stringent in the case of a non-merchant buyer.

6. Under subsection (2) the prior policy is continued of seeking substantial justice in regard to the condition of goods restored to the seller. Thus the buyer may not revoke his acceptance if the goods have materially deteriorated except by reason of their own defects. Worthless goods, however, need not be offered back and minor defects in the articles reoffered are to be disregarded.

7. The policy of the section allowing partial acceptance is carried over into the present section and the buyer may revoke his acceptance, in appropriate cases, as to the entire lot or any commercial unit thereof.

Cross References:

Point 3: Section 2—721.

§ 2—711. Buyer's Remedies in General; Buyer's Security Interest in Rejected Goods

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2—612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

(a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

(b) recover damages for non-delivery as provided in this Article (Section 2—713).

(2) Where the seller fails to deliver or repudiates the buyer may also

(a) if the goods have been identified recover them as provided in this Article (Section 2—502); or

(b) in a proper case obtain specific performance or replevy the goods as provided in this Article (Section 2—716).

(3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (Section 2—706).

Official Comment

Prior Uniform Statutory Provision: No comparable index section; Subsection (3)—Section 69(5), Uniform Sales Act.

Changes: The prior uniform statutory provision is generally continued and expanded in Subsection (3)

Purposes of Changes and New Matter:

1. To index in this section the buyer's remedies, subsection (1) covering those remedies permitting the recovery of money damages, and subsection (2) covering those which permit reaching the goods themselves. The remedies listed here are those available to a buyer who has not accepted the goods or who has justifiably revoked his acceptance. The remedies available to a buyer with regard to goods finally accepted appear in the section dealing with breach in regard to accepted goods. The buyer's right to proceed as to all goods when the breach is as to only some of the goods is determined by the section on breach in installment contracts and by the section on partial acceptance.

Despite the seller's breach, proper retender of delivery under the section on cure of improper tender or replacement can effectively preclude the buyer's remedies under this section, except for any delay involved.

2. To make it clear in subsection (3) that the buyer may hold and resell rejected goods if he has paid a part of the price or incurred expenses of the type specified "Paid" as used here includes acceptance of a draft or other time negotiable instrument or the signing of a negotiable note. His freedom of resale is coextensive with that of a seller under this Article except that the buyer may not keep any profit resulting from the resale and is limited to retaining only the amount of the price paid and the costs involved in the inspection and handling of the goods The buyer's security interest in the goods is intended to be limited to the items listed in subsection (3), and the buyer is not permitted to retain such funds as he might believe adequate for his damages The buyer's right to cover or to have damages for non-delivery, is not impaired by his exercise of his right of resale

3 It should also be noted that this Act requires its remedies to be liberally administered and provides that any right or obligation which it declares is enforceable by action unless a different effect is specifically prescribed (Section 1—106)

Cross References:

Point 1: Sections 2—508, 2—601(c), 2—608, 2—612 and 2—714

Point 2: Section 2—706

Point 3: Section 1—106

Definitional Cross References:

"Aggrieved party". Section 1—201

"Buyer". Section 2—103.

"Cancellation". Section 2—106

"Contract" Section 1—201.

"Cover" Section 2—712.

"Goods" Section 2—105

"Notifies" Section 1—201

"Receipt" of goods Section 2—103

"Remedy" Section 1—201.

"Security interest" Section 1—201

"Seller" Section 2—103

§ 2308. Implied warranties

(a) Restrictions on disclaimers or modifications. No supplier may disclaim or modify (except as provided in subsection (b)) any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.

(b) Limitation on duration. For purposes of this title [15 USCS §§ 2301 et seq.] (other than section 104(a)(2)) [15 USCS § 2304(a)(2)] implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.

(c) Effectiveness of disclaimers, modifications, or limitations. A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this title [15 USCS § 2304(a)] and State law.
(Jan. 4, 1975, P. L. 93-637, Title I, § 108, 88 Stat. 2189.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:
For effective date of section, see 15 USCS § 2312.

Other provisions:
For application of this section, see 15 USCS § 2312.

CROSS REFERENCES

Definitions, 15 USCS § 2301.
Requirement that full warranty may not impose duration limitation on implied warranties, 15 USCS § 2304(a)(2).

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Am Jur:
55 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 771.5–771.10.
67 Am Jur 2d, Sales §§ 425–513.

Am Jur Proof of Facts:
Precast Concrete: Defective Design or Manufacture. 16 Am Jur Proof of Facts 2d, p. 595.

Annotations:
Products liability: personal injury or death allegedly caused by defect in electrical system in motor vehicle. 5 ALR4th 662.

PART 455—USED MOTOR VEHICLE TRADE REGULATION RULE

Sec.

AUTHORITY: 88 Stat. 2189, 15 U.S.C. 2309; 38 Stat. 717, as amended 15 U.S.C. 41 et seq.

SOURCE: 49 FR 45725, Nov. 19, 1984, unless otherwise noted.

EDITORIAL NOTE: At 50 FR 50163, Dec. 9, 1985, in Part 455, the effective date of the Used Car Rule as it applies within the State of Wisconsin was temporarily stayed to June 3, 1986.

§ 455.1 General duties of a used vehicle dealer; definitions.

(a) It is a deceptive act or practice for any used vehicle dealer, when that dealer sells or offers for sale a used vehicle in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act:

(1) To misrepresent the mechanical condition of a used vehicle;

(2) To misrepresent the terms of any warranty offered in connection with the sale of a used vehicle; and

(3) To represent that a used vehicle is sold with a warranty when the vehicle is sold without any warranty.

(b) It is an unfair act or practice for any used vehicle dealer, when that dealer sells or offers for sale a used vehicle in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act:

(1) To fail to disclose, prior to sale, that a used vehicle is sold without any warranty; and

(2) To fail to make available, prior to sale, the terms of any written warranty offered in connection with the sale of a used vehicle.

(c) The Commission has adopted this Rule in order to prevent the unfair and deceptive acts or practices defined in paragraphs (a) and (b). It is a violation of this Rule for any used vehicle dealer to fail to comply with the requirements set forth in §§ 455.2 through 455.5 of this part. If a used vehicle dealer complies with the requirements of §§ 455.2 through 455.5 of this part, the dealer does not violate this Rule. (d) The following definitions shall apply for purposes of this part:

(1) "Vehicle" means any motorized vehicle, other than a motorcycle, with a gross vehicle weight rating (GVWR) of less than 8500 lbs., a curb weight of less than 6,000 lbs., and a frontal area of less than 46 sq. ft.

(2) "Used vehicle" means any vehicle driven more than the limited use necessary in moving or road testing a new vehicle prior to delivery to a consumer, but does not include any vehicle sold only for scrap or parts (title documents surrendered to the State and a salvage certificate issued).

(3) "Dealer" means any person or business which sells or offers for sale a used vehicle after selling or offering for sale five (5) or more used vehicles in the previous twelve months, but does not include a bank or financial in-